

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 TRUST

*

CASE NO. 2014-0485

Appellee

*

**On Appeal from the Butler County
Court of Appeals, 12th District Case
Nos. CA 2012-11-0239 and
CA 2013-05-0068**

-vs-

*

SHARI LEWIS, et al.

*

Appellant.

*

MOTION TO RECONSIDER

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Appellant, Shari Lewis, moves this Court, pursuant to S.Ct.Prac.R. 18.02, to reconsider its decision dismissing this case as having been improvidently allowed for the reasons set forth in the accompanying Memorandum.

Respectfully submitted,

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MEMORANDUM

After this case was fully briefed and argued, this Court dismissed the appeal as having been improvidently allowed. Indeed, whether a true conflict existed between this case and the conflict case, *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228, 9th Dist. No. 26384, was the subject of much of the oral argument. The Trust's argument in that regard was that, because Lewis had obtained a bankruptcy discharge of her liability on the Note, the Trust was not attempting to enforce the Note. In *McFerren*, the lender was attempting to enforce the Note.

At argument, Lewis argued that her bankruptcy discharge merely relieved her of personal

liability under the Note. It did not, however, eliminate the debt. The Trust's arguments to the contrary, the Trust was seeking to enforce the Note. It just was not seeking a personal judgment.

Lewis can only assume that the reasoning behind that Court's dismissal of her appeal is that it believes her bankruptcy discharge somehow eliminated the debt on the Note. Such reasoning is legally erroneous. And for that reasons, Lewis asks that the Court reconsider its decision and decide this case on the merits.

FACTS

Prior to this suit being filed, Ms. Lewis filed a Chapter 7 bankruptcy case and received a discharge of her personal liability. When the Trust filed this case, alleged in its Complaint as follows:

1. The Plaintiff is the holder of a Note executed on or about November 21, 2001, by Defendant, Shari Lewis, aka Shari Frances Lewis, ("Maker"), in the original sum of \$141,600.00, plus interest thereon as set forth in the Note. A copy of the Note is hereto attached as Exhibit A."

2. The *Note is in default* because installment payments ue on the Note have not been paid. As a result, covenants in the Mortgage have not been performed. *Notice of default was given to the Maker under the terms of the Note, and the Note was properly accelerated.* A written notice was sent to the Maker at the property address, or her last known address, *informing her that she is in default under the Note and that if she does not pay the overdue amount by a certain date she will be required to pay the full amount* of unpaid principal plus all interest on the unpaid principal plus costs and expenses. The deadline for payment of the overdue amount passed without payment being made.

3. *The Maker has defaulted under the terms of the Note and Mortgage securing the same; that Plaintiff has declared the debt evidenced by said note due; that there is currently due and owing to the Plaintiff on the Note, the sum of \$125,683.50*, plus interest at the rate of 7.0000 percent per annum, from April 1, 2010, plus late fees, prepayment penalty if applicable, escrow advances, court costs, and other expenses.

4. The Maker, Shari Lewis, aka Shari Frances Lewis, is immune from personal liability on said Note by virtue of Bankruptcy Case No. 1:08-bk-13305, United States Bankruptcy Court for The Southern District of Ohio.

Complaint, Docket No. 4 (emphasis added).

Thus, in its own Complaint, the Trust asserts, *inter alia*, that Lewis defaulted under the Note, the Trust has accelerated the Note, the Note evidences the debt, and the money due to the Trust is due under the Note.

In its judgment entry, the trial court noted that the Trust filed its motion for summary judgment “to obtain a finding of default upon the Note.” *In Rem Judgment Entry and Decree of Foreclosure*, Docket No. 77, p.1. The Court went to grant judgment as follows:

The Court finds that the allegations contained in the Complaint are true, that ***there is due and owing to the Plaintiff, on the Note, the principal balance of \$125,683.500*** plus interest at the rate of 7.00000 per cent per annum

Id. p. 2.

ARGUMENT

The Trust argued that the Court should dismiss the appeal because there was no conflict to be decided. It argued that because Lewis had received a discharge of her obligation under the Note that it was not seeking to enforce the Note. That assertion is a red herring.

In this case, the Trust did not argue that the Note was irrelevant until it reached this Court. Prior to that, it argued vociferously that it was entitled to enforce the Note. When it sued, it expressly alleged that its injury was due to Lewis’s default under the Note. It alleged that the money it claimed to be due it was due under the Note. It sought and obtained judgment under the Note. And when it was forced to admit that it didn’t have the Note, it expressly invoked the provisions of R.C. 1303.38 to argue it was entitled to enforce the Note even though the Note was lost.

The simple fact is that Lewis's personal liability under the Note does not alter the fact that the Trust is enforcing the Note. Lewis's personal liability does not change the legal analysis on the issues presented.

This Court stated over 100 years ago that "[w]here a promissory note is secured by mortgage, the note, not the mortgage, represents the debt." *Kernohan v. Manss*, 41 N.E. 258, 53 Ohio St. 118, syll. 1 (1895). And since that pronouncement, Ohio's courts have echoed that holding. See, *Bank of America, N.A. v. Pasqualone*, 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795, ¶38 ("the note is evidence of the debt and the mortgage is a mere incident of the debt.") (citing *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340, ¶ 32); *Citimortgage, Inc. v. Loncar*, 7th Dist. Mahoning No. 11 MA 174, 2013-Ohio-2959, ¶17. Just because an individual's personal liability under a Note is discharged in bankruptcy does not change the fact that the Note exists and represents the debt. In other words, the bankruptcy discharge does not change the essence of the debt. The debt has always been, and will always be, represented by the Note.

The Trust's argument that it cannot enforce the Note against Ms. Lewis is only partially true. It is true that the bankruptcy discharge bars it from obtaining a personal judgment against Lewis. But the discharge did not extinguish the debt itself. The debt, and the document which represents the debt – the Note, still exist and are the critical components in this case.

A bankruptcy discharge does not discharge the debt itself. It discharges only the personal obligation to pay the debt.

It is important to note, however, that a discharge only destroys many of the remedies a creditor ordinarily might have against the debtor. *It does not extinguish the debt.* See *Matter of Magary* (M.D.Fla.1982), 22 B.R. 164; *Helms v. Helms* (6th Cir.1942), 129 F.2d 263. Discharge simply enjoins the creditor from holding the debtor personally liable for a debt owed by the debtor to the creditor.

The Fort Jennings State Bank v. Roof, 3rd Dist. Putnam No. 12-86-5, 88-LW-2533, p. 4 (emphasis added); see also *In re Western Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990) (“a discharge in bankruptcy does not extinguish the debt itself but merely releases the debtor from personal liability.... The debt still exists, however, and can be collected from any other entity that may be liable.” (quoting *In re Lembke*, 93 B.R. 701, 702 (Bankr.D.N.D.1988)); *Hall v. National Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997) (“ a discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt.”); *In re Waldo*, 417 B.R. 854 (Bkrcty.E.D.Tenn. 2009) (“This fresh start is accomplished through discharge, which "does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt." (quoting *In re Williams*, 291 B.R. 445, 446 (Bankr.E.D.Tenn. 2003))).

The Court’s concern about deciding only those cases which are properly before it is well-founded. But this case does present a real conflict between two of Ohio’s Courts of Appeals. And this issue will continue to confuse Ohio’s lower courts. In fact, the Court accepted a discretionary appeal on this very issue in *Deutsche Bank Nat’l Trust Co., as Trustee v. Holden*, Case No. 2014-0791. The briefing in that case was stayed pending decision in this case.

CONCLUSION

The basis for deciding this case is legitimate. This Note is, and always has been, about the Note. Thus the Court should reconsider its decision to dismiss this appeal.

For the foregoing reasons, Appellant asks that the Court reconsider its decision in this matter, and decide the case on the merits.

Respectfully submitted,

/s/ Andrew M. Engel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon John B. Kopf, III, Esq. **THOMPSON HINE LLP**, 41 South High Street, Suite 1700, Columbus, Ohio 43215 and Scott A. King, Esq. and Terry W. Posey, Esq., **THOMPSON HINE LLP, THOMPSON HINE LLP**, Austin Landing I, 10050 Innovation Drive, Suite 400, Dayton, Ohio 45342-4934 on this 4th day of May 2015.

/s/ Andrew M. Engel

Andrew M. Engel